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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. PAUL EDWARD JONES, JR., Defendant and Appellant.	B205290 (Los Angeles County Super. Ct. No. KA052316)

APPEAL from a judgment of the Superior Court of Los Angeles County. Carol Williams Elswick, Judge. Reversed and remanded.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Robert M. Snider, for Plaintiff and Respondent.

Defendant Paul Edward Jones, Jr. appeals his conviction for engaging in oral copulation with a minor under 16 years old by an adult over the age of 21. Defendant challenges not the lawfulness of the conviction itself, which was secured following a guilty plea, but that he was unconstitutionally subjected to the mandatory sex offender registration statute. (Pen. Code, § 290.)[1] The Attorney General acknowledges: (1) the trial court's order is inconsistent with appellate court opinions filed after the trial court's sentence here; and (2) defendant is entitled to a new hearing on the registration requirement. We agree, and remand for the trial court to hold a hearing.

DISCUSSION

The underlying facts are not germane to the resolution of this appeal, and we state them succinctly. The information charged defendant with committing an act of oral copulation on a minor under the age of 16. (§ 288a, subd. (b)(2).) The record suggests the victim was 15 years old at the time of the incident. Defendant was alleged to have been over the age of 21, and the prosecutor told the trial court that defendant was 21 years and 4 months at the time of offense. Defendant pled guilty to the charge and was placed on three years' probation that included lifetime sex offender registration. On September 5, 2007, several years after probation had expired, defendant filed a motion to vacate the lifetime registration order.

Defendant argued in the trial court, much as he does here, that the mandatory lifetime registration requirement for the offense he committed violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution. In denying the motion, the trial court distinguished *People v. Hofsheier* (2006) 37 Cal.4th 1185, which found an equal protection violation in the mandatory registration requirement for a similar, but not identical, offense. We conclude, as have two appellate courts before us, that the

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[1] All further code references are to the Penal Code.

distinction relied on by the trial court has no legal significance and *Hofsheier's* analysis applies equally here.

Section 288a has several components, three of which bear on our analysis. Defendant here was convicted of violating subdivision (b)(2) which prohibits a person over the age of 21 from engaging in oral copulation with anyone between 14 and 16 years old. Subdivision (b)(1) of the statute punishes oral copulation with someone over 16 years old but under 18; subdivision (c)(1) punishes oral copulation with a person under 14 years old when the perpetrator is more than 10 years older than the victim.

In *Hofsheier*, our Supreme Court held that subdivision (b)(1) was unconstitutional when viewed in light of dissimilar registration requirements for a defendant convicted of section 261.5. That section makes it unlawful to have sexual intercourse with persons under the age of 18. As in section 288a, the Legislature has provided for increasing punishment for violations of section 261.5 depending on the ages of the victim and the defendant. Unlike section 288a subdivision (b)(1), section 261.5 is not listed in the mandatory lifetime registration requirement of section 290. A violation of section 261.5 does make the defendant subject to *discretionary* registration under section 290.006. *Hofsheier* held that mandatory registration for a defendant who had engaged in an act of oral copulation with a person under 18 but not for a defendant who had engaged in sexual intercourse with a person under 18 violated equal protection.

The trial court was aware of *Hofsheier*, but found it not on point. It apparently concluded that because *Hofsheier* dealt with section 288a, subdivision (b)(1), and the present conviction was under subdivision (b)(2), *Hofsheier's* analysis did not apply.

That issue was squarely before the Court of Appeal in *People v. Garcia* (2008) 161 Cal.App.4th 475, a case decided after the hearing on defendant's motion in the trial court. The defendant in *Garcia* was convicted of oral copulation with a person less than 16 years old under section 288a, subdivision (b)(2), the same statute of which defendant here was convicted. The *Garcia* defendant also filed a motion to terminate the mandatory lifetime registration requirement. The trial court denied the motion. The Court of Appeal reversed.

We quote liberally from the opinion authored by Justice Jackson for it applies with equal force here:

"The People contend *Hofsheier* does not apply here, because defendant was convicted of violating subdivision (b)(2) rather than (b)(1) of section 288a. We disagree.

"Subdivision (b)(1) of section 288a provides that 'any person who participates in an act of oral copulation with another person who is under 18 years of age' is guilty of oral copulation. Subdivision (b)(2) of section 288a applies to 'any person over the age of 21 years who participates in an act of oral copulation with another person who is under 16 years of age.'

"The People argue that the Supreme Court 'deliberately decided *People v. Hofsheier* on narrow grounds,' emphasizing 'that its holding applied only to the specific crime at issue, that is, oral copulation between an adult offender and a 16- or 17-year-old victim, in violation of section 288a, subdivision (b)(1).' While *Hofsheier* may have been decided on narrow grounds, the principles on which the decision rests have broader application.

"The crucial issue before the court was whether there is any rational basis for making a distinction between oral copulation and sexual intercourse when determining who must register as a sex offender, all other factors being equal. The Supreme Court concluded there is not. It noted that '[i]f there is no plausible reason, based on reasonably conceivable facts, why judicial discretion is sufficient to protect against repeat offenders who engage in sexual intercourse but not against repeat offenders who engage in oral copulation, then to deny the latter group the recourse of judicial discretion is to deny them the equal protection of the laws.' (*People v. Hofsheier*, *supra*, 37 Cal.4th at p. 1204, fn. 6.)

"A person over 21 convicted of oral copulation of a 14 year old in violation of section 288a, subdivision (b)(2), is subject to the mandatory registration requirements of section 290, subdivision (c) (§ 290, former subd. (a)(1)(A)). A person over 21 convicted of unlawful sexual intercourse with a 14 year old in violation of section 261.5 is subject to the discretionary registration requirements of section 290.006 (§ 290, former subd.

(a)(2)(E)). If there is no rational reason for this disparate treatment when the victim is 16 years old, there can be no rational reason for the disparate treatment when the victim is even younger, 14 years old. Accordingly, *Hofsheier* applies whether the conviction is under subdivision (b)(2) or (b)(1) of section 288a." (*People v. Garcia, supra,* 161 Cal.App.4th at pp. 481-482; footnotes omitted.)

Following *Garcia,* Division 2 of this district also concluded that mandatory lifetime registration for convictions under section 288, subdivision (b)(2) was unconstitutional. (*People v. Hernandez* (2008) 166 Cal.App.4th 641, 651; see also *In re J.P.* (Feb. 9, 2009, A1188585) __ Cal.App.4th __, 2009 DJDAR 1787 [ban on mandatory regulation under § 288s, subd. (a)(1) applies to juveniles].)[2]

We agree that the analysis in *Garcia* and *Hernandez* applies here. We also agree with the remedy selected by those two courts, and remand the matter to the trial court to determine whether or not to exercise its discretion to order registration under section 290.006. (See *People v. Hofsheier, supra,* 37 Cal.4th at p. 1209.)

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[2] *Hernandez* is more on point factually than is *Garcia.* Defendant here and the defendant in *Hernandez* were both less than 10 years older than the victim. When the defendant is more than 10 years older than the victim, section 288, subdivision (c)(1) (lewd conduct on a 14 or 15 year old) applies to acts of both oral copulation and unlawful intercourse, and a defendant may be subject to mandatory lifetime registration for violating section 288, subdivision (c)(1). The *Garcia* defendant was more than 10 years older than his victim but the impact of section 288 was not raised in that case. (See *People v. Garcia, supra,* 161 Cal.App.4th at p. 478*; People v. Hernandez, supra,* 166 Cal.App.4th at p. 651.) *People v. Manchel* (2008) 163 Cal.App.4th 1108 held that when the defendant is convicted under section 288a, subdivision (b)(2) for conduct that also constitutes lewd conduct under section 288, there is no equal protection violation because under section 288 the defendant would have been subject to mandatory registration whether the act was unlawful intercourse or oral copulation. Since the present case does not involve a defendant 10 years older than the victim, *Manchel* does not apply. The Attorney General does not argue to the contrary.

DISPOSITION

The order appealed from is reversed. On remand, the trial court is directed to remove the requirement that appellant register as a sex offender pursuant to subdivision (c) of section 290, and to determine whether appellant is subject to discretionary registration pursuant to section 290.006, and, if so, to exercise its discretion whether to require defendant to register under that provision.

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RUBIN, ACTING P. J.

WE CONCUR:

BIGELOW, J.

O'NEILL, J.*

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* Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.